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THE MEMORANDUM OF UNDERSTANDING: ISSUES IN THE FORMATION OF INTERNATIONAL COOPERATIVE PROJECTS

THESIS

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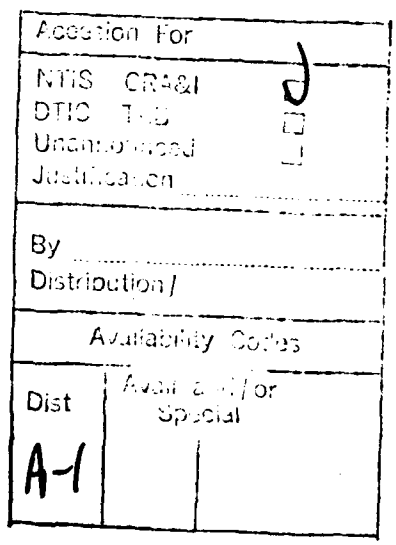
The opinions and conclusions in this paper are those of the author and are not intended to represent the official position of the DOD, USAF, or any other government agency.



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THESIS

Presented to the Faculty of the School of Systems and Logistics
of the Air Force Institute of Technology
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Abstract

With defense budgets shrinking world wide, a successful national defense will increasingly depend on the successful use of international cooperative programs (ICPs). Failure of the DOD to recognize and deal with its shortcomings in ICP management could result in increased costs and a decreased willingness of foreign countries and firms to participate in these programs with the U.S. The foundation of all ICPs is the Memorandum Of Understanding (MOU). These complex documents detail the roles and responsibilities of each participating nation. Because of their importance and intricate nature, negotiating MOUs can take months and even years.

This research will outline the MOU process from its very inception as a potential cooperative program to its consummation as an actual international agreement. It will describe the principals and other participants as well as their function, perspective, and influence on the approval and negotiation process.

Furthermore, this analysis will attempt to highlight problem areas that impede progress toward an MOU. Both U.S. and allied perspectives on the causes, impacts and possible solutions to these problems will be analyzed.

THE MEMORANDUM OF UNDERSTANDING: ISSUES IN THE FORMATION OF INTERNATIONAL COOPERATIVE PROJECTS

I. Background

General Issue

International Cooperative Programs (ICPs) are those in which the United States signs agreements with allied nations to jointly develop and produce weapons systems. The use of these types of programs has increased by over 3000 percent since 1950 (Farr, 1985:25), and they also account for more than five percent (approximately $7.6 billion for 1989) of DOD funds expended on weapons systems acquisition. Numerous authors have cited the potential benefits of international cooperation. Among these benefits is the ability for the U.S. government as well as industry to share the substantial risk and investment required in the development of modern defense systems. ICPs also improve the interoperability of allied defense systems, a longstanding goal of the NATO Alliance.

Current global trends as well as the forecasts of defense experts reflect a high probability that defense budgets of the 1990s will decrease substantially (Morrocco, 1989:26-27). This environment will most likely contribute to the continued use of cooperative agreements as each country struggles to maximize the return on its defense

dollars. While U.S. participation in these cooperative programs is expected to continue, and while ICPs offer numerous benefits, the U.S. has a mixed track record in managing these complex and challenging programs. "Many international programs have failed for a variety of reasons while others have succeeded despite similar obstacles" (Farr, 1989:9).

Specific Problem

With defense budgets shrinking world wide, a successful national defense will increasingly depend on the successful use of cooperative programs. Failure of the DOD to recognize and deal with its shortcomings in ICP management could result in increased costs and a decreased willingness of foreign countries and firms to participate in these programs with the U.S.

The foundation of all ICPs is the Memorandum Of Understanding (MOU). These complex documents detail the roles and responsibilities of each participating nation. Because of their importance and intricate nature, negotiating MOUs can take months and even years.

Once the U.S. negotiates an MOU, it must be reviewed by numerous organizations within the originating department or service, as well as other interested organizations inside and outside DOD. Each organization reviews the MOU to insure areas of particular importance to that office are

addressed. For example, the Department of Commerce might review an MOU with an eye toward trade and industrial base issues (among others), whereas a General Counsel's office might review it to insure the MOU complies with U.S. law.

Further complicating matters, each MOU is in some respects unique. The issues that are important in any given MOU vary depending on the type of program, the countries involved, and the U.S. department or organization initiating the agreement.

Approach of the Study

Since the mid-1980s, there has been considerable growth in the available literature on international cooperative projects. However, virtually none of this literature has analytically examined the process of negotiating and staffing a Memorandum of Understanding. With one exception, experts queried during the research interviews confirmed that no such information existed. The exception refers to the development of a new course at the Defense Systems Management College (DSMC).

> Until the Defense Systems Management College launched the Advanced International Management Workshop (AIMW) in December 1989, there was no education program anywhere for training our international negotiators in these types of agreements, even though some of the agreements potentially committed billions in defense expenditures! (Kwatnoski, 1990:36)

Developed concurrently with this research, the first production offering of the workshop was offered during 18-22 June 1990. Developed in response to needs clearly

articulated by each of the military services, the AIMW course was designed to teach students how the MOU process should work and provide some "hands on" experience through a realistic negotiation exercise.

A collateral benefit of the workshop is that the myriad information needed by U.S. negotiators has, for the first time ever, been centralized in the AIMW course material. Prior to the development of the AIMW, the regulations and laws that guide the conduct of international programs were dispersed throughout the DOD. Usually the only way a project officer became familiar with a particular law or regulation, was when he came in conflict with it while staffing his MOU package for approval.

This research is intended to complement the work done on the AIMW by providing additional material on the MOU process, and the problems associated with it. Specifically, the research will outline the MOU process from its very inception as a potential cooperative program to its consummation as an actual international agreement. It will describe the principals and other participants as well as their function, perspective, and influence on the approval and negotiation process.

Furthermore, this analysis will attempt to highlight problem areas that impede progress toward an MOU. Both U.S. and allied perspectives on the causes, impacts and possible solutions to these problems will be analyzed.

Research Objectives

In light of the foregoing discussion, this research established the following objectives:

1. Outline the MOU negotiation, review and approval process to include the participants, their functions, roles and perceptions.

2. Identify the problems encountered in the MOU process. Delineate the causes and assess the impacts of those problems on the possibility for long term success of the MOU process. Present both the U.S. and Allied perspectives.

3. Recommend strategies for improving the MOU process.

Research Method

The data collection needed to achieve the above objectives was accomplished through personal structured interviews. Several sources requested that they remain anonymous. The author decided that granting anonymity would improve the research by encouraging the interviewees to be completely candid in their responses. Therefore, the report lists the agencies and offices that were contacted (see Appendix A), but does not identify individual names. Data collection was accomplished in four steps:

1. Design the interview. Identify contacts and set appointments. An interview guide (see Appendix B) was designed to collect information concerning all three objectives. It was validated by assessing the applicability of responses to the above stated objectives. It also solicited other points of contact for further interviews.

2. Conduct the interviews.

3. Analyze interview responses.

4. Follow up with telephone calls or additional visits whenever clarification was needed.

Interview responses were analyzed to assess their applicability to the stated objectives. The responses were grouped as they applied to the three objectives. They were then further grouped as to their source (U.S. or allied).

Prior to its use, the interview guide was reviewed by subject matter and research methods experts at the Air Force Institute of Technology (AFIT). The guide was further reviewed by subject matter experts in Washington D.C. prior to the initiation of interviews. After the first round of interviews, the guide was again reviewed to determine if it needed to be modified to include other objectives or to better focus responses toward the research objectives.

II. The Current MOU Process

This chapter addresses the first research objective which is reprinted below for the reader's convenience:

> Outline the MOU negotiation, review and approval process to include the participants, their functions, roles and perceptions.

The MOU process is but one step in the development of an international cooperative program. Figure 1 (Farr 1989:10) outlines the many activities that precede and follow the negotiation of the MOU.

Prior to negotiating an MOU, the U.S. must consider many issues such as national security, technology transfer, and economic concerns among others (Griffin 1989:159-165). The Griffin thesis provides and excellent discussion of the more important factors considered prior to deciding to participate in an international cooperative program.

Figure 2 (Farr 1990) shows the spectrum of international activities that may have an MOU as their foundation.

The activities listed as preliminary serve program offices and other agencies by providing the means to identify sources for possible cooperative opportunities. NATO FORA are meeting of the NATO allies to discuss and exchange information. Data Exchange Agreements (DEAs) and Information Exchange Programs (IEPs) are more formalized arrangements in which the technology or information to be

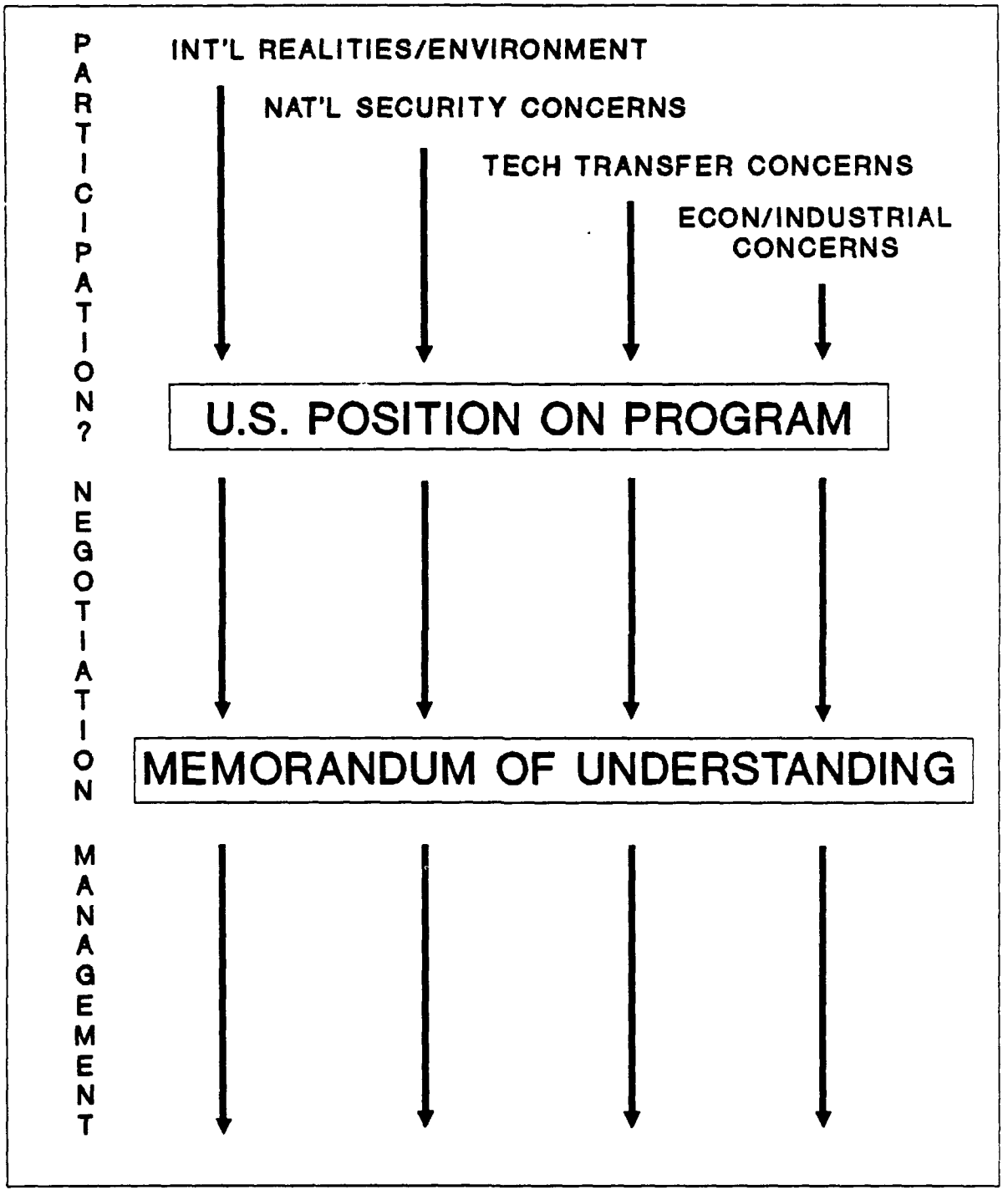

Figure 1 - U.S. Analysis of International Armament Programs

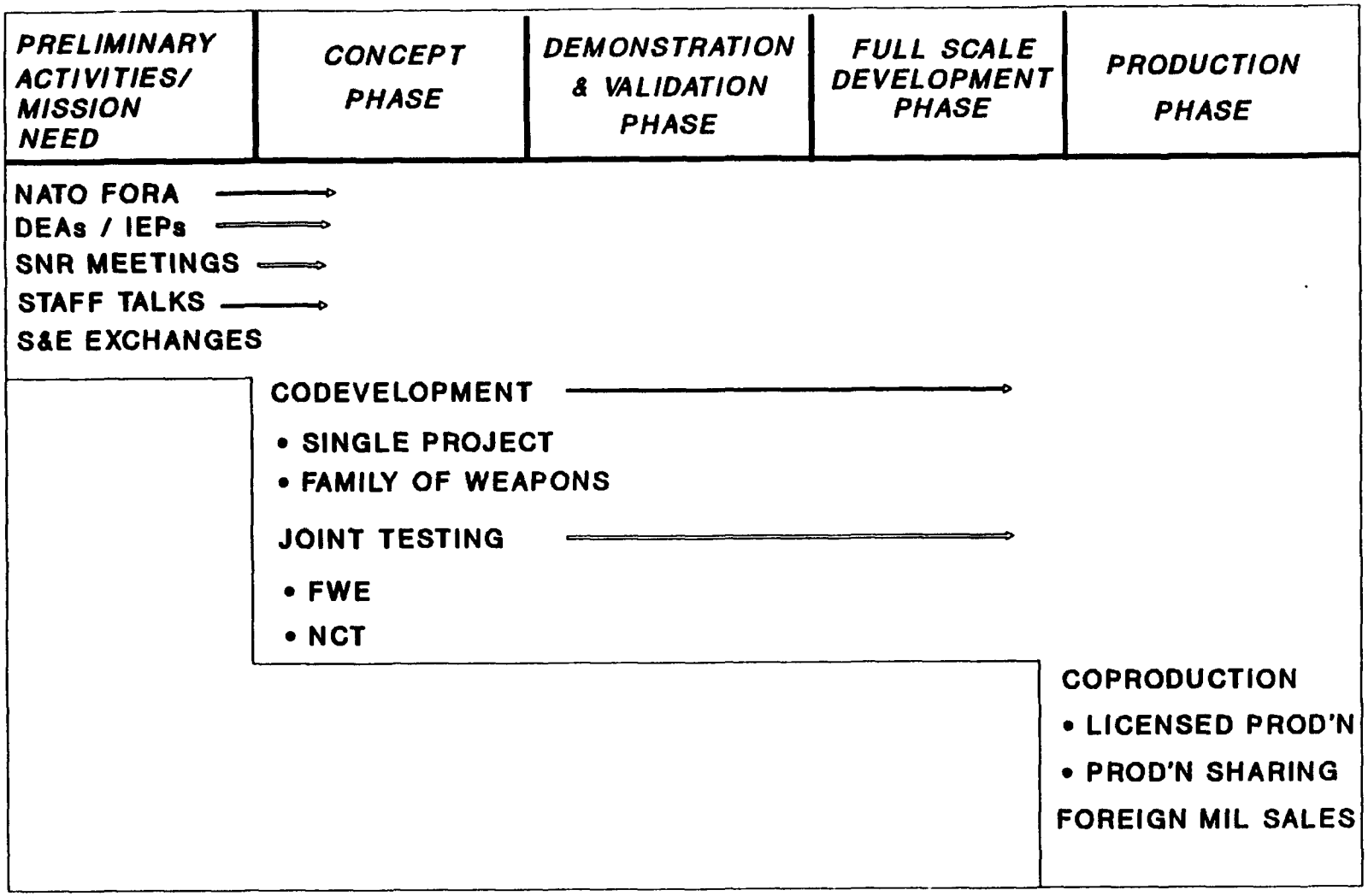

Figure 2 - International Activities
Associated With Defense Acquisition Phases

exchanged are expressly detailed as well as the methods of exchange. Senior National Representative (SNR) Meetings are discussions with other nations whose attendants are the SNR from their country for a specific technology or scientific discipline. Science and Engineering (S&E) Exchanges are exchanges of scientific or engineering personnel between countries for a specified period of time. The goal of these exchanges is to enhance technology and information exchange for the host as well as visitor nation.

Figure 3 describes the MOU existing process. The identification of cooperative opportunities and the preliminary (but limited) discussions with possible partners are part of the "participation" decision phase of Figure 1. The activities performed in the identification of possible opportunities is accomplished through one or more of the preliminary activities discussed in Figure 2. It is important to note that these activities facilitate the identification of cooperative opportunities, but are by no means the only methods of identification. On going commercial and military relationships are just two examples of other possible methods. The decision to participate in a particular program culminates in a statement of intent signed by all proposed parties.

Once the U.S. has decided to participate in an international program, the head of the responsible DOD

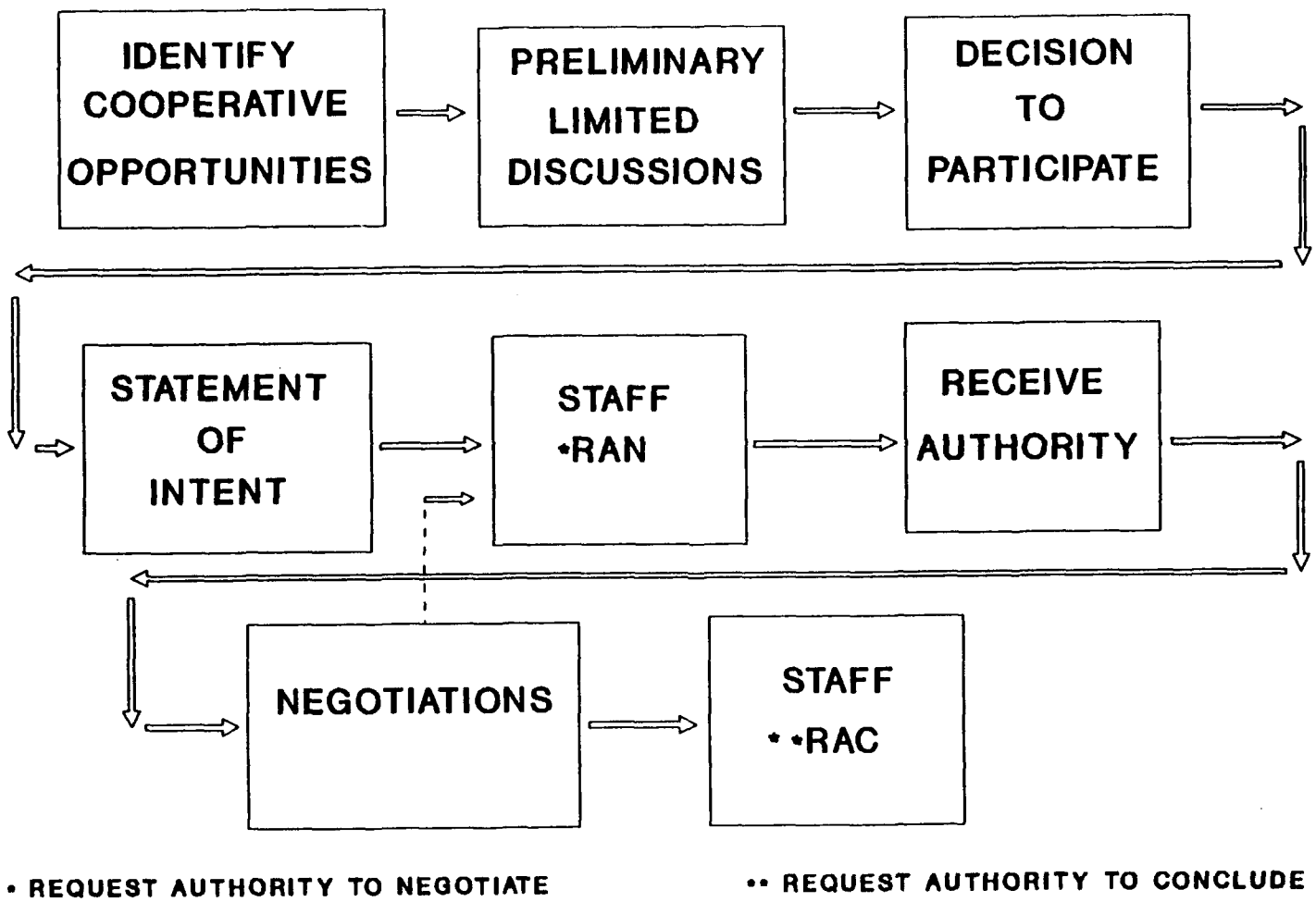

Figure 3 - The MOU Process

component must Request Authority to Negotiate (RAN) an international agreement.

> DoD personnel shall neither initiate nor conduct the negotiation of an international agreement, nor request another U.S. Government organization to negotiate an international agreement, without prior written approval by the DoD officer who is assigned approval responsibility. . .(DOD Directive 5530.3.)

Approval authority rests with the Under Secretary of Defense (Policy) or his delegate (DoD 5530.3). The request usually consists of an outline of the proposed agreement and a description of the purpose and goals of the MOU. There is no guidance that details the types of issues or areas of responsibility that should be addressed in an MOU. Furthermore, there is no guidance that tells a project manager what supplemental material/information should accompany the RAN/RAC.

Prior to submittal, the request is staffed through various offices for coordination. The number of interested parties can vary greatly from program to program depending on the MOU's purpose, the Service or Component involved and the proposed foreign participants. Several agencies and departments have legitimate interests and responsibilities with respect to the MOU process and should be given the opportunity to coordinate on the request. They are listed below along with descriptions of their usual concerns when reviewing an MOU.

- Office of the Secretary of Defense Comptroller (OSD/C): interested in the funding profile of the program.

- Office of the Secretary of Defense General Counsel (OSD/GC): insures the MOU conforms to U.S. laws and regulations.

- Under Secretary of Defense for Policy (USDP): responsible for insuring that the MOU is in concert with DOD policy objectives.

  -- Defense Security Assistance Agency (DSAA): interested in issues affecting U.S. security assistance, government to government transfers, Foreign Military Sales (FMS), and defense technologies.

  -- Defense Technology Security Administration (DTSA): responsible for export licence issues, and insuring such exports meet national policy objectives.

  -- The offices of International Security Assistance (ISA) and International Security Policy (ISP): responsible for insuring the MOU meets U.S. international political and military objectives. ISA and ISP are responsible for different geographic regions of the globe with

  ISP responsible for NATO agreements and ISA for most other countries.

- The State Department: insures the agreement meets U.S. foreign policy objectives.

- The Department of Commerce: interested in assuring the MOU does not adversely effect the U.S. industrial base.

- Under Secretary of Defense for Acquisition/Foreign Contracting: interested in the international (and occasionally domestic) contracting aspects of the MOU. Insures the procedures applied make sense and are proper for the type of program envisioned.

- USD for Acquisition/International Programs: interested in cooperative research and development (R&D) and international coproduction issues

- Any number of other agencies or departments that may be influenced by portions of the MOU.

Once authority to negotiate is granted, the Program Manager (PM) and other personnel involved may begin discussions with their foreign counterparts. If agreement cannot be reached within the limits stipulated in the RAN, the negotiators must create new negotiating positions and staff them again through the appropriate offices above.

At the completion of negotiations, the PM must Request Authority to Conclude (RAC) negotiations. This request must again be reviewed by the above parties. RANs and RACs may be submitted at the same time, but their authority will only remain valid if there are no substantive changes to the original submittal.

This process of review, negotiations, and approval can take from 30 days to two years or more depending on the complexity of the issues, the particular countries involved, current U.S. foreign policy objectives, the purpose of the MOU and the number of agencies influenced by the proposed agreement.

For example, the negotiations for the NATO Airborne Warning Attack and Control System (AWACS) took two and a half years (June 1976-December 1978) from the first proposal to NATO to the signing of the MOU (Tessmer, 1988: 5,140). Further, this two and a half year time frame did not include

the numerous background discussions that normally precede most major system initiatives.

Such long times experienced in negotiating MOUs are caused by several interacting factors. Many MOUs concern programs of high dollar value, therefore, each nation wants to insure that their respective rights and responsibilities are described in great detail. Questions of liability, funding, currency exchange rates, intellectual property, and third party sales are but a few of the areas of important interest to each country that can be difficult to negotiate. Add to these issues the difficulty of meeting the goals of each country and the internal political agendas each must meet, and it is easy to see how negotiations can linger for months or years.

The process was unusually difficult with the AWACS program because thirteen countries were involved. For instance, some of the countries balked at using the U.S. FMS procedures because they felt it did not give them adequate influence in program decisions. Moreover, this was the first time that NATO as an entity had purchased a weapon system so there were no standard procedures to follow.

Another more recent example of the difficulties experienced with international agreements is the Fighter Support-Experimental Program, more commonly known as the FSX. This example, while not necessarily typical because of

historic U.S.-Japanese trade tensions, highlights the myriad factors that can influence the international negotiation arena such as: partisan politics, economics, trade balance questions, protection of technology and the U.S. industrial base, and the changing of political administrations (Reagan to Bush in this instance) to name but a few.

After a two to three year debate in both Japan and the U.S., the Japanese decided in October 1987 to acquire their new fighter aircraft through modification of the F-16C (Griffin, 1989:2-3). A little over a year later, an MOU for the FSX was signed on November 29, 1988. However, support for the program was intensely debated through the public media as the Department of Commerce and some members of Congress lined up against the deal. During the change of administrations from Presidents Reagan to Bush, FSX opponents seized the opportunity to reopen the negotiations. Eventually, the program was confirmed and the "real" MOU was signed in April of 1989 (Griffin, 1989:10-11).

In summary, both the NATO AWACS and the FSX programs aptly illustrate the unpredictable forces that can influence the process of negotiating an international MOU. The remainder of the study addresses some of the problems encountered in this process, and makes recommendations for improvement.

III. Problems with the Process

This chapter addresses the second research objective which is reprinted below for the reader's convenience:

> Identify the problems encountered in the MOU process. Delineate the causes and assess the impacts of those problems on the possibility for long term success of the MOU process. Present both the U.S. and Allied perspectives.

With so many participants in the MOU process, each with their own point of view on a given issue, problems and conflicts are bound to arise. This research analyzed the problems that hamper progress toward the signing of an MOU. They fall into two broad categories.

The first consists of U.S. internal problems; those problems within the U.S. MOU initiation, review, and approval process. The second category concerns U.S. problems from an allied perspective. These are problems many of our partners have with the way the U.S. does business that make it more difficult and less desirable for other countries to participate in ICPs with the U.S.

U.S. Internal Problems

1. No definitive guidance exists that details what a Program Manager from one of the services must do to get an MOU approved. The services have to send their MOUs through numerous agencies for comments. The agencies rarely see each other's comments and the service is left to reconcile the various (and at times conflicting) comments into a coherent document.

For example, the services see their OSD counterparts as stumbling blocks. Until recently, OSD essentially "rubber stamped" MOUs the services sent through for coordination. Now OSD wants to review and approve every one. The RAN/RAC process detailed earlier is being used, but the services feel OSD uses it to exercise veto power. When the service comes in with a RAC, OSD withholds the authority to conclude and recommends changes to a document that has taken months to negotiate. The services feel that OSD, at times, is withholding authority to conclude based on their recommended "wording" changes that have no effect on the intent or substance of the MOU.

Every MOU is different and no one document could possibly detail what it takes to get every MOU approved. U.S. laws and procedures often change yearly, so that guidance that is issued is frequently outdated by the time it is published. Remember that the MOU process took two and a half years on the AWACS program. Agreements made during the first year of the process could become null and void because of policy or law changes occurring during the second year.

There are, however, some aspects of the process that could safely be described as generic for each MOU. In this light, OSD has issued a policy letter consolidating the guidance on the MOU approval process and staffed it through the requisite chains of command. Nonetheless, this guidance has not reached the hands of all the personnel who actually

work the MOUs. Those who are aware of the guidance feel there is no consensus as to its applicability.

Furthermore, OSD is preparing material that details what to expect and how to conduct international negotiations. Once published it will be put in the DSMC library and made available to those working international programs. However, it will not be required reading, nor is the library accessible to everyone who might need the information.

From an OSD or agency perspective, the services often send up documents for approval that are such bad deals for the U.S. that they wonder if the services have actually reviewed them at all. The problem is that OSD and the agencies often receive proposed MOUs or RANs in a vacuum. They have no idea how the program was initiated or why the service is pursuing the agreement.

For example, what at face value may seem like a terrible deal for the U.S. may in fact be a great deal, if one considers that the U.S. is receiving state of the art technology it has been trying to acquire for a number of years. But, no guidance exists that directs the service to include a history of the agreement or an explanation of what are apparently disparate commitments by the parties to the MOU.

2. <u>U.S. personnel lack experience in international negotiation thus putting the U.S. at a disadvantage from the outset in MOU negotiations</u>. One of the major causes of our

lack of experience is the lack of continuity of personnel in international negotiations. Most of our negotiators are military and therefore usually only serve as negotiators for 2-3 years.

The Germans, for example, have many of the same people negotiating MOUs today as they did 15 or 20 years ago. Moreover, foreign negotiators are usually responsible for all their country's MOUs. It is quite likely that the Air Force could negotiate an MOU for a cooperative development program with an individual from Germany and the Army would negotiate with the same individual on a coproduction MOU. The German and British negotiators in particular have experience throughout the entire spectrum of their international programs, and are not limited to the programs of a particular service.

By virtue of their lack of experience, our negotiators often take a very limited view of what they have authority to negotiate. They often further restrict themselves to negotiating within the "wording" rather than the "intent" of their authority. Another result of their lack of experience is that U.S. negotiators are in fact more limited in their authority than their foreign counterparts. The U.S. must limit the authority of its negotiators because it cannot rely on their experience. It takes years of experience for a negotiator to be able to realize when they are approaching the limits of what they will be able to get approved.

Further compounding the problem is the fact that there is no mandatory training for U.S. negotiators. The DSMC course will provide invaluable information and training, but it will take years to get all of negotiators trained, and by the time they are trained, many will be rotated to new assignments. In contrast to the U.S., most of our allies' international programs are run by civilians with the military acting in an advisory capacity. This allows them to retain a high degree of continuity among their negotiators.

3. The difficulties experienced when working toward an MOU may cause our allies to be reluctant or even unwilling to do business with the U.S. One of the major impediments encountered in negotiating agreements is the unwillingness of the U.S. to play by the same rules we impose on others when dealing with us. For example, with FMS, the U.S. insists on funds being committed by the buying country up front and a clear delineation of U.S. responsibilities. However, when we are the buying nation, we refuse to be bound by the same stipulations. Some countries have been known to go so far as to include unfavorable clauses (to the U.S.) in MOUs simply because we made them sign up to a similar clause in a previous MOU.

For years, the U.S. has been the leader in technology and thus usually had the lead role in cooperative agreements. This also allowed us to have much more

influence in negotiating MOUs. Such is not necessarily the case any longer. Nonetheless, some PMs and other negotiators approach negotiations with the attitude that we will get everything done our way. Still others come into international negotiations with a "we-they" attitude. With more and more countries closing the technology gap with the U.S., numerous interview respondents felt that "many countries may well avoid the hassle of working with the U.S. and take their business and cooperative opportunities elsewhere".

4. Some U.S participants in the MOU review and approval process impede rather than facilitate progress toward an international agreement. For instance, the OSD General counsel's office reviews MOUs to insure they are legal. They often cite the Arms Export Control Act in decisions restricting proposed actions in an MOU. The sections of the act cited are often sections in which the General Counsel's office had significant input when the Act was being drafted.

The implication from other participants is that if the General Counsel's office was interested in furthering international cooperation they could have done so through the use of less restrictive wording when asked for input on the act. The legality of proposed actions in an MOU can often be a matter of legal interpretation. Some participants feel the General Counsel's office takes a more

narrow interpretation than is pragmatic when dealing with foreign partners.

Congressional oversight and the recent inclusion of the Department of Commerce in the review cycle further complicates, and lengthens, the process. Both of these participants have different agendas for international cooperation than do the services. The services are primarily interested in national security and international cooperation. Conversely, Congress and the Department of Commerce are primarily interested in our trade balance and the industrial base.

A few years ago, the OSD combined the programs for the mobilization base, industrial mobilization, and international cooperation into one area under a single individual. The roles and attitudes of each of these programs are often in direct conflict with one another. Combining them under one individual sent a signal to our foreign partners that the U.S. is not serious about international cooperation.

The OSD/GC, Congress, the Department of Commerce and the other agencies involved in the MOU process, each have functional areas of responsibility and charters to follow. The fact that they are, at times, in conflict with each other and inhibit progress toward a signed MOU does not mean that they are trying to undermine cooperative agreements. This merely serves to highlight the fact that the U.S. is

not organized for international cooperation. It is this failure to consolidate our efforts toward an MOU that creates the climate in which conflicts and confusion flourish, thus further complicating the inherently difficult process of international negotiation.

The Foreign Perspective

1. The U.S. MOU process is too long and complex. Our foreign partners feel the U.S. bureaucracy extends down even to our negotiating teams. Their teams usually consist of three or four people and have a wide range of authority. U.S. teams usually consist of much larger groups with little or no authority. Our allies feel this puts U.S. negotiation teams at a disadvantage. They feel that every time they propose a change on an issue, the U.S. team has to contact the Pentagon and staff the change before the team can make a decision.

For example, in a recent negotiation in Europe, the U.S. had a team of more than twenty individuals and no one had the authority to sign an MOU. A participant noted one of the most difficult parts of dealing with the U.S. is finding someone who can say yes.

Another problem area is the different procedures each service and the DOD use to manage MOUs. One participant said "it seems the rules change depending on who you're dealing with." For instance, a certain proposal could be

perfectly acceptable to the Air Force or DSAA and the Army would never be able to accept it.

An example of how difficult it is to work with the U.S. concerns a Middle Eastern Prince visiting the U.S. to buy more F-15s. He had to get permission to present a briefing to plead his case. He did so and after an extensive briefing, his request was denied. On his trip home he stopped in Britain and met with Mrs. Thatcher. He asked her if he could present his briefing to her in hopes of buying some Tornados. She told him that he did not need to make a presentation, they would have no problem selling him the planes.

2. <u>The U.S. procedures for the release of information are too restrictive and cumbersome</u>. Our allies often have to negotiate for months to get access to information considered to be "sensitive". When a country requests access to certain data the request must be reviewed to determine whether or not the country is a "qualifying" nation. This means the U.S. has faith in their ability and inclination to safeguard the information we are planning to give them.

Many of our foreign partners resent the "hoops" we make them jump through to have access to our information. Several have been trading partners for the last twenty years and do not understand why they have to go through the qualification process on each request for data. One

participant said: "the U.S. sometimes treats its allies as if they were Russians." An interesting point made by one participant is that the data is almost always released. If it is not released after the first request, further negotiation usually results in its eventual release. Given that information is usually released anyway, interview respondents felt that the U.S. is needlessly incurring process delays (months and sometimes years) as well as fostering ill feelings from our allies.

Some of the participants feel our data restrictions are the result of protectionism. One stated: "the critical technologies list is a blue print for the end of cooperation." Congress is drafting legislation that will allow the service secretaries to restrict the solicitation of products involving the use of such critical technologies to domestic sources. They feel that protectionism is a sign of weakness and will eventually be the downfall of the U.S. (in terms of technological leadership). They believe foreign competition would encourage technological advancement for all parties concerned.

3. <u>The difficulty of working with the U.S. effects the willingness of our allies to work with us and may cause the U.S. to miss out on cooperative opportunities</u>. Twenty years ago, when the U.S. was the uncontested leader in technology, our foreign partners accepted the troubles of dealing with the U.S. for access to vastly superior products. The

technological edge the U.S. enjoyed has been eroded, and perhaps lost, in some areas like electronics. The U.S. is no longer the sole source of quality high-tech products.

When queried about their preference for technology, foreign participants stated that in most cases U.S. technology was still their preferred choice, but that often it is simply too much trouble to obtain. Some partners said that, as long as an alternate system was workable and serviceable, they would buy a system of lesser capability rather than go through the trouble of buying with or from the U.S. One stated: "so what if it can carry two missiles or four, the difference is just not worth it."

Many feel the U.S. fails to take advantage of some cooperative opportunities because of an inability to make timely decisions about important issues such as technology transfer or whether or not they want to participate in a specific cooperative opportunity. Other countries have closed many of the previously existing technology gaps, resulting in the opportunity for our current international cooperative partners to go elsewhere if they choose.

Other Related Issues

Other issues related to the MOU process were discovered during this research. These issues relate primarily to the effect of U.S. policies on the ease or difficulty of negotiating MOUs and other international agreements.

1. Contract Procedural Issues. Because of the long standing U.S. lead in technology we have been able to exact contract terms favorable to ourselves such as termination clauses and the equipment return policy on FMS sales. The FMS clause states that the buying nation will return the equipment they bought to the U.S. on demand. Many countries feel this and other similar clauses are unfair and unenforceable.

Our foreign counterparts often come to the negotiating table with their contractor selected for a particular cooperative venture whereas the U.S. has yet to decide who its industry participant will be. Further, the U.S. selection of that participant must be accomplished through the use of competitive acquisition. As a result, the allied country is strategically several steps ahead in deciding cost and work shares. This puts the U.S. at a disadvantage in negotiating an MOU because of our lack of information and also slows down the overall process.

The laws of the lead nation are used in drawing up contract terms and conditions. When the U.S. is the lead nation, our requirements for competition are applied to foreign subcontractors. Most other countries do not have the large selection of aerospace and technical firms enjoyed by the U.S. Our allies usually have one or two contractors in each field and rotate contract awards between companies. The "arms length" approach of the U.S. forbids us from doing the same.

Problems arise when we force other countries to comply with U.S. competition requirements. It is difficult for a foreign firm to compete its subcontracts when their country has only one source for the specified product. Furthermore, we require them to allow U.S. firms to compete for their subcontract acquisitions. This angers our foreign partners because although they are in turn allowed to compete for U.S. contracts, many of those contract opportunities are effectively foreclosed by the Buy American Act which precludes purchasing selected products from non-U.S. suppliers.

The socio-economic clauses also prevent or restrict the award of contracts to foreign firms. For instance, with their smaller industrial bases and less diverse cultures it is almost impossible for them to meet a small disadvantaged business or labor surplus area subcontract requirement.

While most of these clauses are waiverable, many inexperienced contracting officers (COs) are not aware of this. Even if they are aware of the waiver procedures, the levels of approval are so high and so hard to reach, many COs do not even attempt to get waivers. COs also shy from waivering these clauses for foreign competitors because they cannot waive them for U.S. firms. The price difference for compliance with these various clauses is significant and may well determine the contract award decision.

Many foreign firms balk at the U.S. requirements for pricing data and the amount of audit oversight they must

allow (also waiverable to some extent). When foreign firms are working on a cooperative project as part of a consortium they are very sensitive to the possibility of their pricing data falling into their competitor's hands.

Some countries feel the U.S. protest procedures are too lax. They feel protests are often filed merely because the contract has been awarded to a foreign firm. The costs of defending against such protests (legal fees, etc.) can severely restrict the profits of a foreign firm even if they eventually win the award. More and more foreign firms are not willing to take the risk.

2. U.S. Policy Issues. Foreign participants feel Congress gets too involved with acquisitions. They feel Congress sometimes causes award decisions to be changed based on technology transfer issues despite the fact that the Services or program management office want the product offered by the foreign firm. The recent delays on the FSX program with Japan are a good example of Congressional trade, technology transfer, and other politically motivated concerns overriding Service decisions.

Other countries weigh the social impacts and benefits of cooperative programs much more heavily than does the U.S. if it considers them at all. The U.S. tends to worry about its trade balance and whether or not the participating U.S. firm is going to make a large enough profit. Some countries will actually sign up to a program if it only breaks even,

or perhaps loses money, if the program provides jobs for a certain sector of its economy.

Another contentious U.S. policy concerns the handling of FMS agreements. Policy dictates that FMS programs cannot cost the U.S. any money and that funds for proposed sales be deposited in the U.S. by the buying nation at the outset. The buying countries feel this is unfair but are willing to acquiesce whenever they want the equipment badly. What further angers them is the fact that, even though they have deposited millions of dollars prior to receiving any equipment, we audit them extremely closely "trying to figure out the cost of pencils."

3. Funding/Budget Issues. The U.S. does not budget any more funds for personnel on a cooperative program than it does for a domestic U.S. program. The personnel needs of a cooperative project are generally greater than those of a domestic project due to the many complications of the negotiation and management processes discussed previously. These greater personnel needs are rarely met. Therefore, these complex, high dollar programs must be managed using fewer personnel than required. This increases the likelihood of mismanagement and further slows what is already a sluggish process.

Some U.S. personnel feel that the U.S budgeting process causes many cooperative programs to perform marginally from a cost standpoint. Many of the projects the U.S. ends up

doing cooperatively are those that fell short in the budgeting process and would not get done at all if the U.S. had to totally fund the entire venture itself.

The Nunn Amendment, Section 1103 of the Fiscal Year 1986 Defense Authorization Act, P.L. 99-145, "NATO Cooperative Research and Development," can have similar results. The amendment provides "seed money" for the Services to conduct cooperative R&D with NATO allies for the first two years of a program. Then, if the procuring service wishes to continue the program it must provide service funding. Two problems have arisen with this well intended initiative.

One problem is that this money is time sensitive in that it must be used within two years. However, as previously noted, the time from identification of a program to the signing of an MOU can easily exceed these limits.

A more expensive problem arises once one of the services uses this seed money and gets two years into a program. If they wish to continue the program, the service must provide their own funding. In several cases, the services have chosen relatively low priority programs for Nunn Amendment funding (programs that would otherwise not have existed). The U.S. has withdrawn from several of these low priority Nunn programs when the service was unwilling to continue funding for the program. The result is that two years of R&D money has been wasted and our allies are

beginning to view the U.S. as an unreliable partner in these cooperative ventures.

IV. Improving the Process

This chapter addresses the third research objective:

Recommend strategies for improving the MOU process.

The experts interviewed during this research identified a number of significant problems with the MOU process. The following section offers recommendations for resolving these problems.

Procedural Recommendations

At a minimum, U.S. negotiators should have to attend the Advanced International Management Workshop (AIMW) prior to negotiating agreements for the U.S. One of our major problems is that U.S. negotiators lack authority or do not realize the extent of the authority they possess. Attendance at the AIMW and other training would delineate the bounds of their authority and better prepare them to participate in international negotiations.

Furthermore, it would allow the U.S. to have more confidence in its negotiators. With this accomplished, the U.S. would be able to increase the authority of its negotiators. The MOU process would be improved by virtue of the reduced number of interruptions to the negotiation process.

The U.S. must develop guidelines delineating basic items of importance that should be addressed in every MOU as well as the agency responsible for reviewing those items.

As the situation now stands, items of critical importance could be omitted because of inexperience or lack of guidance.

In this same vein, the U.S. should develop pre-negotiation review procedures similar to those currently used in the acquisition community. Prior to the negotiation of high dollar value contracts, the negotiator must prepare and brief their prospective negotiating positions to upper management. Management then approves or disapproves those positions and sets a range within which any dollar amount negotiated is acceptable. The negotiator has full authority to accept a contractor's proposal in that range.

Analogous procedures could be used in the RAN/RAC process prior to negotiating MOUs. Additionally, each request should be accompanied by a "history" of the program. This history would describe the genesis of and the reasons for the program. It would explain any incongruities between benefits derived and apparently burdensome responsibilities or inappropriately high costs. This would eliminate the confusion experienced when other agencies review an MOU containing terms and conditions that appear unfavorable to the U.S.

The U.S. needs to educate its contracting officers as to their ability to waive various clauses that do not apply to international programs, and also needs to make the waiver process easier. The reluctance of contracting officers to

waive various clauses, whether through ignorance or unwillingness to go through the difficult approval process, could cause the U.S. to miss cooperative opportunities. The U.S. might not attempt to participate in a program because a CO has wrongly determined some clauses would have to be observed, or an ally might refuse to participate with the U.S. because of what they feel are overly restrictive or prejudicial clauses.

One approach would be to identify in the Federal Acquisition Regulation (FAR) those clauses that would not apply in the event that the contract involves an international program. A separate section should be developed, similar to those already in existence for special situations like contracting with small businesses and non-profit institutions. This section would list the clauses that are most often waived and perhaps list exceptions (such as those permitting sole source contracting) that would allow the contracting officer to waive the clauses.

This section could contain alternate clauses which were more applicable to international contracting. It could also outline the procedures for waiving various clauses as well as those for acquiring the approval of such waivers at higher levels if necessary. If these clauses and procedures for their use are put into regulation, the approval levels for allowing their use could be lowered, thus streamlining the MOU process.

Along these lines, a NATO working group, NATO AC 313, has developed sample special provisions to be used in the feasibility phase of cooperative projects instead of those currently required by the FAR. They are working on similar provisions for the other phases. These clauses would be used as examples of the types of language to be employed instead of the current language that applies to domestic programs.

Fostering an Attitude of Cooperation

As discussed earlier, the technological superiority of the U.S. can no longer be taken for granted. The U.S. needs to demonstrate a "corporate" willingness to cooperate, from the Congress down to the individual negotiator. Contract clauses and FMS rules favorable to the U.S. may no longer be tolerated in a future international arena of technical equals. The U.S. should either modify these rules and clauses or be willing to accept the same conditions when they are not the lead nation on a program.

Congress and the Services should dispense with the "We-They" attitude when deciding technology transfer issues. Such attitudes could return to haunt us if, in the future, it is the U.S. attempting to gain access to another country's technology. Procedures for the release of information should be eased for our proven and trusted allies. The information requested is almost always eventually released. The cumbersome and repetitive review

procedures serve only to further mire an overburdened system and alienate our allies.

Competition requirements for determining U.S. participants in international cooperative programs should be eased. Many of our allies who have more than one source for a given product or service rotate contracts and programs among their various firms. The U.S. industries, while decidedly more numerous than those of our allies, are not so numerous that a rotation system could not be developed for determining the participants in international programs. Tailoring the competition requirements in this manner for international programs would greatly reduce the time frames from program inception to agreement. This would prevent the U.S. from missing opportunities because it cannot decide quickly enough whether or not it wants to participate in a given program.

Organizing for Cooperation

The U.S. needs to develop a single organization to perform all international negotiation duties. This organization should include personnel from the key disciplines of contracting, law, and program management. Consolidating these disciplines under one individual would alleviate the current problem of different agencies having conflicting agendas.

The variance of procedures from service to service and agency to agency would be reduced. All MOUs would be

processed in the same manner. The process would be streamlined by virtue of the co-location of reviewing offices and the elimination of conflicting agendas. Negotiation teams consisting of personnel from each discipline could be formed early in the process thus giving the U.S. the advantage of having one team working the project from the start.

The U.S. should develop an International Negotiation career field. This would encourage continuity by providing opportunities for advancement <u>within</u> the field of international negotiation. With continuity, the experience levels of U.S. negotiation personnel would increase. Personnel would be more likely to remain in the organization and gain experience if opportunities for advancement exist.

Such a career field would ideally be populated by a civilian work force to mitigate the discontinuity inherent with the constant rotation of military personnel. The military would continue to have a decisive role in the process and would still serve "tours" in the organization to provide the requisite advice on technical and mission requirements. The creation of such an organization would reduce many of the previously discussed U.S. internal problems.

V. Conclusions

The success of the MOU process is directly linked to the degree to which the aforementioned problems can be resolved. There may be serious consequences if the U.S. fails to correct these deficiencies. The process could remain inefficient, or become more so. The U.S. could be forced to reduce its participation in international programs because of increased costs caused by these inefficiencies or by its inability to find foreign partners willing to endure the difficulties inherent in dealing with the U.S. With other countries closing the technology gap with the U.S., an unwillingness or inability to participate in international programs would destine the U.S. to technical mediocrity.

The U.S. internal problems significantly impact the length of the MOU process and the ease or difficulty of reaching an agreement. The inability of U.S. agencies and departments to reach an accord as to the contents of the MOU precipitates the need for the iterative review process. This then increases the amount of time required to process the MOU and begin actual work on the project. The fact that the various U.S. parties involved do not understand each other's roles, responsibilities or perspectives, further aggravates the problem by creating an antagonistic environment. Participants begin to view their counterparts as obstacles in the process. They begin to make decisions based on parochial attitudes rather than on the needs of the

country and the overall goals of cooperation. Their decisions are well within the legal and regulatory limits of their authority, but even the most mundane of laws, when enforced to its strictest interpretation, can have severe consequences.

Each of these factors in turn, affects the willingness of our allies to participate in cooperative projects with the U.S. Chapter III discussed the misgivings some of our allies have in dealing with the U.S. because of the difficulties experienced with information release, technology transfer, the long approval/review process, etc. Many of our allies are willing to forego attempts to cooperate with the U.S. and accept less technologically advanced systems to avoid the difficulties of dealing with the U.S. bureaucracy. The fact that they are willing to do so when the U.S. still retains a relative technological superiority leads to questions about future cooperative opportunities.

Which countries will continue to participate with the U.S. if our technological advantages continue to erode? How will the U.S gain access to new and better technologies possessed by our allies if there is no technological advantage to working with the U.S. and its MOU process is extremely laborious?

The U.S. must realize that its days of technological dominance may be limited. The Japanese and Germans, among

others, are closing the technology gap and have surpassed the U.S. in some areas. Though it is unlikely that the U.S. will fall far behind its allies with respect to technological capability, a failure to address the problems discussed above will only serve to compound the arduous tasks of acquiring or maintaining a technological edge and could precipitate the end of the U.S. status as a technological leader.

Appendix A: List of Agencies Contacted

1. Headquarters Air Force Systems Command - Foreign Military Sales (AFSC/XRT).
2. Office of the Secretary of the Air Force - International R&D (SAF/AQI).
3. Office of the Secretary of the Air Force - Acquisition (SAF/AQCO).
4. Under Secretary of Defense for Policy - Foreign Contracting.
5. Under Secretary of Defense for Policy - International Programs.
6. Office of the Secretary of Defense General Counsel - International (OSD/GCI).
7. Defense Security Assistance Agency
8. Office of the Secretary of the Air Force General Counsel - International (SAF/GCI).
9. Air Force Chair, Defense Systems Management College.
10. Embassy of Switzerland.
11. Embassy of the Netherlands.
12. British Embassy.
13. Headquarters Air Force Systems Command - Judge Advocate (AFSC/JA).

Appendix B: Interview Guides

Guide # 1 was used to interview personnel in agencies one through eight of Appendix A from 28 February to 3 March 1990. Analysis of their responses led to the development of Guide # 2 which was used to interview personnel in agencies six through thirteen from 14 to 18 May 1990.

Guide # 1 - Interviews from 28 February to 3 March 1990.

QUESTIONS

1. What do you see as the major legal issues that cause conflicts in the management of international programs?

2. Which contracting procedures required by the FAR or other statutes cause problems?

3. Are these types of problems unique to the U.S.?

4. Are these problems always between the U.S. and another country or are there internal conflicts on theses issues as well?

5. How do these problems/conflicts effect our ability to manage international programs?

6. What kind of impact can these problems have on program funding, schedules and costs? What other areas can be effected?

7. How do you think these conflicts effect the willingness of foreign firms and governments to participate in international programs with the U.S.?

8. Once these conflicts arise, what is the best way to resolve them?

9. When planning for international programs, what can be done to prevent conflicts between the U.S. and foreign partners/firms?

10. What can be done to prevent the internal conflicts?

11. Are you aware of any studies or other research that has been done in this area?

12. Can you suggest other possible sources of information concerning theses issues?

13. Can you recommend anyone in the foreign community that could give me their perspective on these issues?

14. Are there any contractor personnel that you think might be good sources of information?

15. Do you have any suggestions as to other issues I should address?

16. Is there anyone else in the DOD or AF that you think I should contact?

Guide # 2 - Inteviews from 14-18 May 1990.

QUESTIONS

1. Who are the participants in the MOU negotiation process?

2. What are the major problems encountered when trying to negotiate an MOU with/for the U.S.?

3. How do these problems impact the negotiation process?

4. Do the problems experienced with the U.S. affect the willingness of other countries to participate with the U.S. in international programs?

5. Are U.S. negotiators at a disadvantage when negotiating MOUs (e.g. inexperienced, lack of continuity, etc.)?

6. Who are the participants in the MOU review and approval process?

7. What types of problems are encountered in the MOU review and approval process?

8. How do these problems impact the MOU process?

9. What can be done to prevent problems in MOU negotiations or in the review and approval process?

10. Does the U.S. "miss out" on cooperative opportunities because of the bureaucratic nature of the U.S. MOU review and approval process?

11. What can the U.S. do to improve they way it negotiates, reviews and approves MOUs?

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With defense budgets shrinking wolrd wide, a successful national defense will increasingly depend on the successful use of international cooperative programs. Failure of the DOD to recognize and deal with its shortcomings in the management of these programs could result in increased costs and a decreased willingness of foreign countries and firms to participate in these programs with the U.S. The foundation of these programs is the Memorandum of Understanding (MOU). These complex documents detail the roles and responsibilities of each participating nation. Because of their importance and intricate nature, negotiating MOUs can take months and even years. This research will outline the MOU process from its inception as a potential cooperative program to its consummation as an actual international agreement. It will describe the principals and other participants as well as their function, perspective, and influence on the approval process. Furthermore, this analysis will attempt to highlight problem areas that impede progress toward an MOU. Both U.S. and allied perspectives and the causes, impacts and possible solutions to these problems will be analyzed.

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